IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01/04/2003

CORAM

THE HONOURABLE MR.JUSTICE A.S.VENKATACHALAMOORTHY
AND
THE HONOURABLE MR.JUSTICE C.NAGAPPAN

Criminal Appeal No.1004 of 1999

1. Sree Vijayakumar,
S/o.Sritharan Nadar.

2. Rajagopal,
S/o.Sritharan Nadar.

3. Jeyabalan,
S/o.Sritharan Nadar.

4. Gunasekaran,
S/o.Sritharan Nadar. ... Appellants/
Accused Nos. 1-4

-Vs-

State, by
Inspector of Police,
Kaliyakkavillai Police Station,
Kaliyakkavillai,
Kanyakumari District. ... Respondent/Complainant

Appeal under Section 374 of Criminal Procedure Code against the conviction and sentence imposed on the appellants in judgment, dated 18 .11.1999, in Sessions Case No.91 of 1998 on the file of Additional Sessions Judge, Kanyakumari District at Nagercoil.

!For Appellants .. Mr.V.Gopinath, Senior Counsel,
for Mr.Anantharangan

^For Respondent .. Mr.V.M.R.Rajendran,
Additional Public Prosecutor.
:JUDGMENT

C.NAGAPPAN,J
L.....T.....T.....T.....T.....T.....T.....T.....T.....T....J

The appellants 1 to 4 were accused Nos.1 to 4 respectively, in Sessions Case No.91 of 1998 on the file of Additional Sessions Judge, Kanyakumari District

at Nagercoil and in this judgment, they will be referred to as accused Nos.1 to 4 for the sake of convenience.

2. Under charge No.1, accused Nos. 1 and 2 were charged for the offence under Section 302 I.P.C. for causing the death of Rajeswaran by hitting him on the head with bottle containing petrol and setting him on fire and the learned Sessions Judge found them guilty and sentenced each one of them to undergo imprisonment for life and to pay a fine of Rs.1,000/- each and in default, each of them to undergo simple imprisonment for six months. Under charge No.2, accused Nos. 3 and 4 were charged for the offence under Section 302 read with Section 34 I.P.C. on the allegation that in furtherance of common intention with accused Nos.1 and 2 to cause the death of Rajeswaran, accused Nos.3 and 4, during the occurrence, prevented Rajeswaran from moving away from the place when accused Nos.1 and 2 set him ablaze and the learned Sessions Judge found them guilty and sentenced each of them to undergo imprisonment for life and each of them to pay a fine of Rs.1,000/- and in default, each of them to undergo simple imprisonment for six months.

Under charge No.3, accused No.2 was charged for the offence under Section 307 I.P.C. on the allegation that he attempted to murder P.W.1 Jagadeeswaran by repeatedly stabbing him with knife and the learned Sessions Judge found him not guilty for the offence charged and instead, found him guilty for the offence under Section 324 I.P.C. and sentenced him to undergo rigorous imprisonment for one year.

Under charge No.4, accused Nos.1, 3 and 4 were charged for the offence under Section 307 read with Section 34 I.P.C. on the allegation that in furtherance of common intention with accused No.2 in attempting to murder P.W.1, accused Nos.1, 3 and 4 caught hold of P.W.1 during the occurrence when accused No.2 stabbed him with knife and the learned Sessions Judge found the accused not guilty for the offence charged and instead, found them guilty for the offence under Section 324 read with Section 34 I.P.C. and sentenced each of them to undergo rigorous imprisonment for one year.

3. To prove its case, the prosecution has examined P.Ws.1 to 17 and marked Exs.P-1 to P-31 as well as M.Os.1 to 10. 4. The case of the prosecution. as discerned from oral and documentary evidence. is summarised as follows. P.W.1 Jegadeeswaran, P.W.3 Ambeeswaran and the deceased are brothers and all the four accused are brothers and they are related to each other. The electricity line to the house of P.W.1 was passing through the father's house of the accused and because of that, a dispute arose between them and a civil suit was filed and it was decreed in favour of the family of P.W.1 and hence enmity grew. On 21.7.1994 at about 7.30 p.m., when Rajeswaran was passing through the shop of accused No.2 Rajagopal, accused No.1 Sree Vijayakumar abused Rajeswaran and hit him on the head with a bottle and the bottle was broken and the liquid in it was spread over the body of Rajeswaran and accused No.3 Jeyabalan and accused No.4 Gunasekaran prevented Rajeswaran from moving away. At that time, accused No.2 Rajagopal took a lighted kerosene lamp from his shop and threw it on Rajeswaran and fire broke out on the body of Rajeswaran and he rolled on the ground. P.W.3 Ambeeswaran ran to the rescue of Rajaswaran and hugged him to put out the fire. P.W.1 Jagadeeswaran also

ran towards Rajeswaran and accused Nos.1, 3 and 4 caught hold of him and accused No.2 Rajagopal stabbed him with M.O.2 knife on the right side of the chest, on the back and on the shoulders. P.Ws.3 and 4 raised hue and cry and the accused ran westwards. P.W.3 Ambeeswaran took Rajeswaran and P.W.1 Jegadeeswaran in an auto-rickshaw to Kuzhithurai Government Hospital. P.W.8 Dr.Vimala examined P.W.1 at 8.30 p.m. on 21.7.1994 in Kuzhithurai Government Hospital and found the following injuries. " (1) Stab injury 2" long 1" wide depth not probed on the right anterior aspect of chest. (2) Stab injury 1" long 1" wide depth, not probed on the right side of back, medial aspect of scapula. (3) Stab injury 1cm long 5cm wide on the left side of back. Linear abrasion 3" long on the left side of back." She referred him to Government Hospital, Nagercoil and issued Ex.P-9 Wound Certificate, in which, she has opined that the injury is simple.

P.W.8 Dr.Vimala examined Rajeswaran at 8.50 a.m on the same day and found 90% of burn injuries all over face, in front of chest, back, thighs and she referred him to Nagercoil Government Hospital. Ex.P-10 is the wound certificate issued by her.

P.W.7 Fire Officer received a telephone message at 7.50 p.m. on 21 .7.1994 about the fire in a provision shop and he proceeded with the party to the scene. He found fire in the shop of accused No.2 Rajagopal and the fire was put out and he found Rajagopal with injuries and he took him to Kuzhithurai Government Hospital.

P.W.8.Dr.Vimala examined accused No.2 Rajagopal at 8.40 p.m. on the same day and found the following injuries. " (1) Deeply lacerated injury 6" long 2" wide on the lateral aspect of left leg over leg calf muscle. (2) Abrasion 1 cm diameter on the lateral aspect of left ankle joint. (3) Lacerated injury 1" long on the left thumb. (4) Abrasion 1" diameter on the left lateral aspect of the head." She referred him to Government Hospital, Nagercoil and opined that the injuries are simple and issued Ex.P-30 wound certificate.

P.W.8 Dr.Vimala examined accused No.4 Gunasekaran at 9.00 p.m. in the hospital and found the following injuries. " Linear abrasion 10 cms long, anterior aspect of right shoulder. Abrasion 2 cms long on the posterior aspect of right shoulder. Diffuse swelling right shoulder with inability to lift right shoulder."

She opined that the injuries are simple and issued Ex.P-31 Wound Certificate and referred him to Government Hospital, Nagercoil. P.W.8 Dr.Vimala examined accused No.1 Sree Vijayakumar at 9.10 p. m. in the hospital and found a diffuse swelling behind left ear and a lacerated injury 1" long 5' x 5'cm in the Web between the left thumb and index finger and treated him as out patient and she issued Ex.P-2 9 wound certificate.

P.W.12 Head Constable Raju received information at 9.30 p.m. on 21 .7.1994 and reached Kuzhithurai Government Hospital at 10.20 p.m. and after obtaining intimation, he proceeded to Kottar Government Headquarters Hospital and recorded Ex.P-3 statement from Rajeswaran at 11.3 0 p.m. He examined accused No.2 Rajagopal at 00.15 a.m. on 22.7.1994 and returned to Kaliyakkavilai

Police Station at 3.00 a.m. He registered a case in Crime No.377 of 1994 under Sections 341, 324 and 307 I.P.C. on the complaint of Rajeswaran and prepared Ex.P-18 first information report. He also registered a case on the complaint of accused No.2 Rajagopal in Crime No.378 of 1994 under Sections 323 and 324 I.P.C.

P.W.2 Judicial Magistrate Mr.Rajasingh Hental Devadoss received Ex.P-1 requisition to record dying declaration from Kottar Government Hospital and went there and recorded Ex.P-2 statement given by Rajeswaran at 00.20 hours on 22.7.1994.

P.W.13 Sub-Inspector Muruga Subramaniyam took up both the cases for investigation and went to the occurrence place and prepared Ex.P-14 observation mahazar in the presence of P.W.5 and P.W.10. He also prepared Ex.P-19 rough sketch. He seized M.Os. 3 to 8 under Ex.P-15 mahazar in the presence of the same witnesses. He examined some witnesses and recorded their statements. He went to Kottar Government Hospital and examined Rajeswaran and recorded his statement. He also examined P.W.1 and recorded his statement and he seized M.O.1 from him under Ex.P-16 mahazar in the presence of P.W.11. He also examined accused No.2 in the hospital. He received Ex.P-21 death intimation that Rajeswaran died on 24.7.1994 and altered the offences in the case in Crime No.377 of 1994 under Sections 341, 324, 307 and 302 IPC and prepared Ex.P-20 express report and despatched the same.

P.W.14 Inspector Chandrasenan, on receipt of express report, took up the investigation. He conducted inquest on the body of Rajeswaran from 9.30 a.m. to 11.30 a.m. on 24.7.1994 and prepared Ex.P-22 inquest report. He sent the body for postmortem with Ex.P-11 requisition. P.W.9 Dr.Lakshmanan conducted autopsy on the body of Rajeswaran at 1.30 p.m. on 24.7.1994 in the Government Headquarters Hospital and found the following. " 1. Burns with blisters with secondary infection seen over face, both upper limb, front of chest upper abdomen, both thigh and whole at back (Except area below both knee, lower abdomen, scrotum, penis and both gulteal region. On dissection, Heart: weight 300 gram. on c/s left ventricle contains clotted blood. Lungs : Right Lune 400 gram, Left Lung 350 grams weight. on c/s congested. Hyoid bone intact. Abdomen: Stomach weight 200 gram empty. Liver:1500 gm. C/s congested. Spleen: 75 gram weight c/s. Congested. Each kidney 100 gram. C/s. congested. Bladder: Empty. On dissection at Head and Neck, no fracture in skull seen. Brain 1400 gram weight. On c/s. Pale. Skin from the chest and skin from the leg were preserved in Sodium Chloride Solution for chemical analysis. Stomach, other viscera not preserved." He opined that the deceased would appear to have died of shock due to burns. Ex.P-12 is the postmortem certificate and Ex.P-13 is the final opinion issued by him. P.W.14 Inspector examined the witnesses in the case in Crime No.37 8 of 1994 and recorded their statements. He arrested accused No.1 Sree Vijayakumar at 12.30 p.m. on 26.7.1994 in Kappikadu Junction and recorded his voluntary statement in the presence of witnesses and on the same day, he sent him for judicial remand. He arrested accused No.4 Gunasekaran on 27.7.1994 at 6.05 p.m. in front of Kottar Government Hospital and sent him for judicial remand. He examined P.W.9 Dr. Lakshmanan on 27.7.1994 and recorded his statement. On 11.8.1994 he arrested accused No.2 Rajagopal in Kuzhithurai East Railway

Station and examined him in the presence of P.W.6 and another and recorded his statement and admissible portion of the same is Ex.P-23. Accused No.2 took M.O.2 knife from his shop and produced the same and P.W.14 recovered the same in the presence of same witnesses under Ex.P-24 mahazar. He gave Ex.P-25 requisition to the Court to send the material objects for chemical examination. Material objects were sent through Ex.P-26 letter of the court for chemical examination. Ex.P-27 is the Chemical Analyst Report. P.W.14 was transferred and P.W.15 Inspector George continued the investigation and he was also transferred.

P.W.16 Inspector Ramachandran took up further investigation and he referred the case in Crime No.378 of 1994 and Ex.P-28 is the final report. He was transferred and P.W.17 Inspector Jute Duraipandian continued the investigation. He examined some witnesses on 9.5.1997 and on 3.6.1997 and recorded their statements. He examined P.W.8 Dr. Vimala on 18.8.1997 and recorded her statement. He examined P.W.1 on 30 .11.1997 and recorded his statement. He examined some more witnesses. He completed the investigation and filed the final report in the case.

5. The accused were questioned under Section 313 Cr.P.C. and they denied complicity in the case. No witness was examined on their side. Ex.D-1 was marked on their side.

6. The learned Sessions Judge convicted and sentenced the accused as stated earlier. Aggrieved by the conviction and sentence, the accused have preferred the present appeal.

7. Accused Nos.1 and 2 stood charged for the offence of murder of Rajeswaran on the allegation that accused No.1 hit him on the head with bottle containing petrol and accused No.2 threw a lighted kerosene lamp on Rajeswaran and he was set ablaze during the occurrence. To prove the occurrence, the prosecution relied on ocular testimony as well as dying declarations made by the deceased. The prosecution

examined P.W.1 Jegadeeswaran, P.W.3 Ambeeswaran and P.W.4 Kunju Krishnan as having witnessed the occurrence. P.W.4 Kunju Krishnan did not support the prosecution case and he was treated as hostile witness.

8. P.W.1 Jegadeeswaran and P.W.3 Ambeeswaran are the brothers of deceased Rajeswaran and according to them, on 21.7.1994 at about 7.30 p.m., when Rajeswaran was passing through accused No.2 Rajagopal's shop, accused No.1 Sree Vijayakumar abused Rajeswaran and hit him on the head with bottle and the bottle was broken and the liquid in it was spread over the body of Rajeswaran and accused Nos.3 and 4 prevented Rajeswaran from moving away and at that time, accused No.2 Rajagopal took a lighted kerosene lamp from his shop a nd threw it on Rajeswaran and fire broke out on the body of Rajeswaran and he rolled on the ground. P.Ws.1 and 3 have further stated that accused Nos.1, 3 and 4 caught hold of P.W.1 Jegadeeswaran and accused No.2 Rajagopal stabbed him with M.O.2 knife and the accused ran away. P.W.3 has taken Rajeswaran and P.W.1 Jegadeeswaran in an auto-rickshaw to Kuzhithurai Government Hospital,

where P.W.8 Dr.Vimala examined them. According to her, 90% burn injuries were found in the body of Rajeswaran and she referred him to Nagercoil Headquarters Government Hospital. Rajeswaran was admitted in Nagercoil Kottar Government Headquarters Hospital. The duty Doctor sent Ex.P-1 requisition to record the Dying Declaration of Rajeswaran and P.W.2 Judicial Magistrate Rajasingh Hental Devadoss recorded Ex.P-2 statement given by Rajeswaran at 00.20 hours on 2 2.7.1994. P.W.12 Head Constable Raju recorded Ex.P-3 Statement from Rajeswaran at 11.30 p.m. on 21.7.1994 in Government Headquarters Hospital and on it he registered a case in Crime No.377 of 1994 under Sections 341, 324 and 307 I.P.C. Rajeswaran died on 24.7.1994 and on the death intimation, P.W.13 Sub-Inspector Muruga Subramaniam altered the case into one of murder.

9. Rajeswaran is said to have died of burns. P.W.8 Dr.Vimala examined Rajeswaran at Kuzhithurai Government Hospital and has found 90% burns all over face, in front of chest, back and both the thighs, except below knee and she referred him to Headquarters Hospital at Nagercoil. Ex.P-10 is the wound certificate issued by her. P.W.9 Dr. Lakshmanan conducted autopsy on the body of Rajeswaran and according to him, burns with blisters with secondary infection were seen over face, both upper limb, front of chest, upper abdomen, both thighs and whole of back and he opined that the deceased would appear to have died of shock due to burns and Ex.P-12 postmortem certificate and Ex.P-13 final opinion are given by him. In the oral testimony, P.W.9 has stated that in the chemical examination report, petrol was detected in the skin and 90% burns found on the body would cause death in the ordinary course of nature. From the testimonies of P.W.8 and P.W.9, it can be safely concluded that Rajeswaran died of burns.

10. The learned senior counsel appearing for the appellants/ accused contended that there were injuries found on the accused and there is no explanation for it and it affects the prosecution case. According to P.W.12 Head Constable, immediately after the occurrence, he went to Government Headquarters Hospital and recorded Ex.P-3 statement of Rajeswaran and also recorded a statement from accused No.2 Rajagopal and he registered a case in Crime No.377 of 1994 on the statement of Rajeswaran and he also registered a case in Crime No.378 of 1994 on the statement of accused No.2. P.W.13 Sub-Inspector Muruga Subramaniam has done preliminary investigation of both the cases. P.W.16 Inspector Ramachandran has referred the case in Crime No.378 of 1994 as mistake of fact and filed final report in Ex.P-28. P.W.8 Dr.Vimala examined accused No.1 Vijayakumar in Kuzhithurai Government Hospital and has found a diffuse swelling behind the left ear and a lacerated injury between the left thumb and index finger and she treated him as outpatient and Ex.P -29 is the wound certificate issued by her. She also examined accused No.2 Rajagopal and has found two lacerated injuries, one in the left leg and another in left thumb and two abrasions, one in left ankle and the other on the left head and she referred him to Government Headquarters Hospital, Nagercoil. In the Headquarters Hospital, X-ray was taken and no bone injury was found and opinion was given that the injury is simple and Ex.P-30 is the wound certificate. P.W.8 Dr.Vimala has also examined accused No.4 Gunasekaran and she has found two abrasions and diffuse swelling in the right shoulder and she had referred him to Government Headquarters Hospital, where X-ray was taken and no bone injury was found and opinion was given that the injury is

simple one and Ex.P-31 is the wound certificate.

11. Learned senior counsel for the appellants/ accused contended that accused No.2 Rajagopal was inpatient for 20 days taking treatment in the Government Headquarters Hospital. It is true that as per Ex. P-30 wound certificate, accused No.2 was admitted in the Headquarters Hospital on 21.7.1994 and discharged only on 10.8.1994. While he was inpatient, X-Rays were taken on his left leg and no bone injury was found and a definite opinion stating that the injury is simple one has been given. What is relevant is the injury and it was a simple one.

12. Another contention was raised that the counter complaint given by the accused was not marked in the case and the prosecution witnesses have not spoken about the injuries on the accused. It is true that the complaint given by accused No.2 was not marked in the case and P.Ws.1 and 3 have not spoken about the injuries on accused Nos.1, 2 and 4. But, it is not as if the prosecution suppressed the counter case registered on the complaint of accused No.2. P.W.12 Head Constable in his chief examination has stated about the recording of the counter complaint and registering a case on it and P.W.13 Sub-Inspector, in the chief examination, has testified that he conducted preliminary investigation in both the cases and P.W.16 Inspector Ramachandran, in his chief examination, has stated about the completion of investigation in the case registered on the counter complaint and having referred the case and filing the final report. P.W.8 Dr.Vimala in the chief examination has testified about the examination of injured accused persons on the date of occurrence itself and the injuries found on them. The wound certificates of A-1, A-2 and A-4 and the final report have been marked in the case. In such circumstances, the contention that the prosecution has not explained the injuries on the accused does not assume importance.

13. It is further contended that accused No.2 was found injured inside his shop and P.W.7 Fire Service Officer, while putting out the small fire, took him to the Government Hospital at Kuzhithurai and admitted him and Ex.D-1 is the fire accident report. The learned Sessions Judge has discussed this in great detail in the judgment and the fact remains that accused No.2 did not suffer any burn injury and he sustained only simple injury as discussed above.

14. The Apex Court in the decision in Rajender Singh and others vs. State of Bihar - (2000 SCC (Cri) 796) has laid down that ordinarily the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of the occurrence, if the injuries are minor in nature, but at the same time if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. The Apex Court in the case in Takhaji Hiraji vs. Thakore Kubersing Chamansing and others - (2001 SCC (Cri) 1070) has held as follows. "It cannot be held as a matter of law or invariably a rule that whenever the accused sustained an injury in the same occurrence, the prosecution is obliged to explain the injury and on the failure of the prosecution to do so the prosecution case should be

disbelieved. Before non-explanation of the injuries on the persons of the accused persons by the prosecution witnesses may affect the prosecution case, the court has to be satisfied of the existence of two conditions: (1) that the injury on the person of the accused was of a serious nature; and (ii) that such injuries must have been caused at the time of the occurrence in question." In the present case, as already seen, the injuries found on the accused persons were only simple in nature and does not affect the prosecution case.

15. The learned senior counsel for the appellants/ accused further contended that accused No.1 is alleged to have hit Rajeswaran on the head with a bottle and the bottle was broken and still there was no injury found on the head of Rajeswaran and also no burn injury was found on the head and this creates suspicion. It is true that P.W.8 and P.W.9 Doctors did not see any injury or burn on the head of Rajeswaran. The ocular testimony is that accused No.1 broke the bottle by hitting it on the head of Rajeswaran and the liquid in it splashed over the body. It is not as if no burn injury was found in the head region. Both the doctors have found extensive burn injuries on the face, chest and the back. Skull is a hard portion and for making a dent on it, the object with which it was hit is also relevant. In the present case, the object is glass bottle and the breaking of it on the head would not make any deep injury on the head. However, on the breaking of the bottle, the content in it, namely, petrol, would only splash and it actually splashed on the face, chest and back. In such circumstances, one cannot expect any burn injury on the head. As per the Chemical Examiner's Report, petrol was detected in the skin from the chest and leg. Hence this contention raised by the appellants is devoid of merit.

16. P.Ws.1 and 3 are stated to be interested witnesses. It is not as if the prosecution has not examined any independent witness to prove the occurrence. P.W.4 was examined to speak about the occurrence but he did not say so and hence he was treated as hostile witness. P.Ws.1 and 3 are the brothers of the deceased and their testimonies have to be scrutinised carefully. P.W.1 was injured during the occurrence and he was also examined by the doctor in the hospital on the same day. According to P.Ws.1 and 3, the electricity line to their house was passing through the house of the accused and a dispute arose over that, which led to the filing of a civil suit and it was decreed in their favour and because of that enmity grew. Accused No.2 Rajagopal, while examined under Section 313 Cr.P.C. has admitted that the civil suit was decreed in favour of P.W.1 and he denied only enmity. Hence it is clear that there was dispute between them and that is the cause for the occurrence. We are satisfied that the ocular testimonies of P.Ws.1 and 3 infuse confidence and they can be safely relied upon. 17. What remains to be considered is the two dying declarations stated to have been given by the deceased. P.W.12 Head Constable Raju has testified that on intimation from the Hospital, he reached Kottar Headquarters Hospital and recorded Ex.P-3 statement given by Rajeswaran at 11.30 p.m. and returned to Kaliyakkavilai Police Station and registered a case on it at 3.00 a.m. He has not stated that he recorded the statement in the presence of Doctor and the Doctor had not given any certificate in it regarding the physical condition of Rajeswaran. Two witnesses have attested Ex.P-3 statement. The first witness is P.W.3 and the second witness is P.W.4.

As already seen, P.W.4 was treated as hostile.

18. A dying declaration made to police officer is admissible in evidence, however, the practice of dying declaration being recorded by investigation officers has been discouraged by the Apex Court and they are to avail the services of a Magistrate for recording dying declaration. Factually, in this case, Magistrate has also recorded dying declaration. P.W.2 Judicial Magistrate Rajasingh Hental Devadoss received Ex.P-1 requisition for recording dying declaration from Kottar Government Headquarters Hospital and went there and recorded Ex.P-2 statement given by Rajeswaran at 00.20 hours on 22.7.1994. The Magistrate in his testimony has stated that he had contacted the patient through the doctor on duty and after putting some questions to the patient to find out whether he was able to make statement and on being satisfied, he recorded Ex.P-2 statement of Rajeswaran and got his left hand thumb impression in it. Dr.B.Lalithakumari has given certificate in it stating that the patient was conscious and answering to questions. In the dying declaration, Rajeswran has stated that accused No.1 hit him with a bottle on his head and accused No.2 Rajagopal threw the fire on him and he was set ablaze and on account of electricity line dispute, enmity grew between them and the suit was decreed in their favour and hence the accused attacked him.

19. The occurrence happened on 21.7.1994 at about 7.30 p.m. and the injured Rajeswaran was referred to Government Headquarters Hospital and he got admitted there and during mid-night, at 00.20 hours on 22.7.1994, the Judicial Magistrate has examined him and found him fit to make statement and recorded his statement. Rajeswran died only on 2 4.7.1994. In this context, the latest pronouncement of the Constitutional Bench of the Apex Court in Laxman vs. State of Maharashtra - (AIR 2002 SC 2973) is relevant and it is extracted below. "3. .... What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise." As already seen, in the present case, the learned Magistrate has recorded the statement in the presence of Dr.B.Lalithakumari and she has also certified that the patient was conscious and answering questions.

20. It is true that Dr.B.Lalithakumari was not examined in the case. But that does not affect the evidentiary value to be attached to the dying declaration. In fact, their Lordships of the Apex Court in the recent decision in Shanmugam alias Kulandaivelu vs. State of Tamil Nadu - (AIR 2003 SC 209) has laid down as follows. "8. We find no good reason to discard the dying declaration (Ext.P.1 6) recorded by the Judicial Magistrate within a few hours after the victim was admitted in the hospital. The Judicial Magistrate, who was examined as P.W.11, categorically stated that he satisfied himself that the victim was conscious and was in a position to make the statement when he made the statement. The Medical Officer of the hospital was present at the time when he recorded the statement and he also made an endorsement on

Ext.P-16 about the consciousness of the patient. The mere fact the Doctor, in whose presence Ex.P-16 was recorded, was not examined does not affect the evidentiary value to be attached to the dying declaration. ..." In the present case, the learned Magistrate had put some questions to satisfy himself that Rajeswaran was conscious enough to give the statement in the presence of Doctor and recorded the same. There are no suspicious features which affect the credibility of the dying declaration and it allures confidence of the Court in the factual context. The ocular testimonies of P.Ws.1 and 3 are being corroborated by the dying declaration of the deceased.

21. Under charge No.1, the learned Sessions Judge has framed charge under Section 302 IPC against both the accused and found them guilty for the offence. As already seen, accused No.1 hit Rajeswaran with glass bottle on the head and it was broken and the petrol in it splashed over the body of Rajeswaran and accused No.2 Rajagopal took a lighted kerosene lamp from his shop and threw it on Rajeswaran and he was set ablaze resulting in his death. It is clear from the above facts that both the accused shared common intention for causing murder of Rajeswaran and they are liable for the offence under Section 302 read with Section 34 I.P.C. and the conviction on them has to be modified accordingly.

22. Under charge No.2, accused Nos.3 and 4 were charged for the offence under Section 302 read with Section 34 IPC on the allegation that in furtherence of common intention with accused Nos.1 and 2 to cause the death of Rajeswaran, they prevented Rajeswaran from moving away from the place when accused Nos.1 and 2 set him ablaze. P.Ws.1 and 3 have stated that during the occurrence, accused No.1 hit Rajeswaran on the head with a bottle and the liquid on it got spread over his body and accused Nos.3 and 4 namely, Jayabalan and Gunasekaran, prevented Rajeswaran from moving away and at that time, accused No.2 Rajagopal took a lighted kerosene lamp from his shop and threw it on Rajeswaran and he was set ablaze. Rajeswaran in his Ex.P-2 dying declaration did not state that when he was set ablaze, accused No.3 Jayabalan and accused No.4 Gunasekaran prevented him from moving away. He has only stated that accused Nos.3 and 4 helped accused No.1 during the occurrence. He did not say asto in what way accused Nos.3 and 4 helped accused No.1. Rajeswaran has clearly stated about the attack made on him and the attack made on P.W.1 and also the motive for the occurrence. Having elaborated so, he has not stated that accused Nos.3 and 4 prevented him from moving away during the attack on him. In such circumstance, a suspicion arises asto whether accused Nos.3 and 4 prevented Rajeswaran from moving away during the attack made on him by the other accused. Further, it is doubtful as to whether there was common intention for them to cause the death of Rajeswaran. The benefit of doubt goes in their favour and accused Nos.3 and 4 are liable to be acquitted of the charge under Section 302 read with Section 34 I.P.C. and the conviction and sentence imposed on them in this regard is liable to be set aside.

23. Under charge No.3, accused No.2 was charged for the offence under Section 307 I.P.C. on the allegation that he attempted to commit murder of P.W.1 Jegadeeswaran by stabbing him with knife and the learned Sessions Judge found him not guilty for the offence charged and instead, found him guilty for the offence under Section 324 I.P.C. Under charge No.4, accused Nos.1, 3 and 4

were charged for the offence under Section 307 read with Section34 I.P.C. on the allegation that in furtherence of common intention with accused No.2, they caught hold of P.W.1 when accused No.2 stabbed him with knife and the learned Sessions Judge found them not guilty for the offence charged and instead, found them guilty for the offence under Section 324 read with Section 34 I.P.C.

24. According to P.Ws.1 and 3, during the occurrence, accused Nos.1 , 3 and 4 caught hold of P.W.1 Jegadeeswaran and accused No.2 Rajagopal stabbed him with M.O.2 knife on the right side of chest, on the back and on shoulders. P.W.8 Dr.Vimala examined P.W.1 and found three stab injuries on the chest and back and the injuries are simple in nature as per Ex.P-9 wound certificate. In Ex.P-2 Dying Declaration, Rajeswaran has stated about the attack made by accused No.2 on P.W.1 and it corroborates the ocular testimony. In the facts and circumstances of the case, the learned Sessions Judge has rightly found accused No.2 guilty for the offence of causing hurt with dangerous weapon and accused Nos.1, 3 and 4 are liable for the offence under Section 324 read with Section 34 I.P.C. Under Charge Nos. 3 and 4, the conviction and sentence imposed on the accused are proper and do not call for any interference.

25. In the result, (a) the conviction of appellants 1 and 2/accused Nos.1 and 2 for the offence under Section 302 I.P.C. and sentencing each of them to suffer imprisonment for life and to pay a fine of Rs.1,000/- and in default, to undergo simple imprisonment for six months are set aside and instead, they are convicted for the offence under Section 302 read with Section 34 I.P.C. and each of them is sentenced to undergo imprisonment for life; (b) the conviction of accused Nos.3 and 4 for the offence under Section 302 read with Section 34 I.P.C. and the sentence imposed on each of them to suffer imprisonment for life and to pay a fine of Rs.1,000 /- and in default, to undergo simple imprisonment for six months are set aside and they are acquitted of the charge; and (c)the conviction of accused No.2 under Section 324 I.P.C. and the conviction of accused Nos.1, 3 and 4 for the offence under Section 324 read with Section 34 I.P.C. and the sentence imposed on them are confirmed.

The appeal is allowed to the extent indicated above.

Index:yes. Internet:yes. gb.

To:

1. The Principal District and Sessions Judge, Kanyakumari District at Nagercoil.

2. The Additional District Judge cum Chief Judicial Magistrate, Kanyakumari District at Nagercoil.

3. The Inspector of Police, Kaliyakkavilai Police Station, Kanyakumari District.

4. The Superintendent, Central Prison,